Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1232

CHARLES JACKSON, LONNIE DANIELS, JOHNNY JENKINS, PETER PURSLEY, JEAN SIMMONS, ISSAC REAMS, STEVE BELL, TROTTER JORDAN, and ANTHONY GREENE, on behalf of themselves and all others similiarly situated; THE BLACK STUDENTS' UNION, and unincorporated association; WILLIAM E. PHILLIPS and PHILLIP FRAZIER,

Petitioners,

VS.

S.I. HAYAKAWA, former President of San Francisco State College, BOARD OF TRUSTEES OF THE CALIFORNIA STATE COLLEGE SYSTEM; SAN FRANCISCO STATE COLLEGE; DONALD GARRITY, Vice President for Academic Affairs at San Francisco State College; FRANK DOLLARD, Executive Vice President at San Francisco State College; DONALD SCOBEL, Administrative Assistant at San Francisco State College; EDWARD DUERR, Coordinator of Internal Affairs at San Francisco State College; ORRIN DELAND, Business Manager at San Francisco State College; WILLIAM HARKNESS, Dean of Student Activities at San Francisco State College, and PAUL ROMBERG, current President of San Francisco State College, individually and in their official Capacity,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 6, 1980.

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No.

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, CHARLES JACKSON, LONNIE DANIELS, JOHNNY JENKINS, PETER PURSLEY, JEAN SIMMONS, ISSAC REAMS, STEVE BELL, TROTTER JORDAN, and ANTHONY GREENE, on behalf of themselves and all others similarly situated, THE BLACK STUDENTS' UNION, an unincorporated association, WILLIE E. PHILLIPS and PHILLIP FRAZIER, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 4, 1979.

OPINION BELOW

The opinion of the Court of Appeals, which appears in the appendix hereto as App. 1, *infra*, is reported at 605 F. 2d 1121 (1979). In addition, the opinion of the District Court for the Northern District of California entered on April 20, 1977, appears in the appendix hereto as App. 2, *infra*, but is not otherwise reported.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 4, 1979. A timely application for an extension of time to file this petition was made to the Honorable Justice Rhenquist. The application was approved and an extension given to and including February 8, 1980. The petition was filed within the deadline date of February 8, 1980. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether absentees in a prior uncertified class action were denied due process in that the prior suit was held to have binding effect on their first claim in the instant case.

2. Whether, by the erroneous application of *res judicata* to the instant case the plaintiffs were denied

equal access to the Courts and due process of law.

3. Whether the Appeals Court erred in not following this Court's decision in *American Pipe* and *Construction Co. v. Utah*, 414 U.S. 538 (1974), when it barred plaintiff PURSLEY'S intervention as untimely.

4. Whether, the due process and equal access inherent to Federal Rules of Civil Procedure, Rule 23 is ill-served when, assuming plaintiff PURSLEY is the sole named representative and his claim is held time barred, a timely brought class action is barred as well.

5. Whether Summary Judgment was proper on the issue of racial discrimination in the allocation of student fees just because plaintiff, BLACK STUDENTS' UNION, could only show a reduced allocation rather than no allocation, but did show that black student employees were denied their salaries while white students were not.

STATUTORY PROVISIONS PROVIDED

The First Amendment to the United States Constitution, 42 U.S.C., Sections 1981, 1983 and 1985, Rule 23 of the Federal Rules of Civil Procedure, the California State Education and Administrative Codes, and the California State Penal Code (via pendent jurisdiction).

STATEMENT OF THE CASE

During the school year 1968 and 1969, a significant part of the student and faculty of SAN FRANCISCO STATE COLLEGE, (now California State University, San Francisco) went on strike in protest against what they believed was the college administration's undemocratic and manipulative intervention in student and faculty affairs. At some unspecified time in 1968, and continously through the relevant period, the City Police had a visible presence on the campus along with various plainclothes and other secret police and the FBI's Operation COINTELPRO domestic Spying Campaign, all with the actual approval of the college administration and the encouragement of the Board of Trustees. To deal with the strike and a effort to resume the classroom instructional program, S.I. HAYAKAWA, "acting President", issued a number of regulations, most of which proved ineffective and constitutional appropriateness of which is questionable.

For most of the decade of the sixties, students and faculty had established a "free speech" platform located in the central area of the campus. In this location speeches, rallies and demonstrations were the usual fare. No prior administrations had ever challenged the right of students to rally and protest in this area until S.I. HAYAKAWA became "acting President". For example, the Decree dated December 2, 1968, entitled

"Declaration of Emergency" contained a provision as follows:

> "3. The Speakers Platform shall be available to only those persons of groups who have scheduled the use of the facility with the Dean of Students Office. The use of the facility will be at such times and under such conditions as shall be announced by that office."

Naturally, for the guardians of liberty who typically made use of the platform, this decree provoked even greater use of the platform.

On or about January 4, 1979, the defendant, HAYAKAWA, ISSUED A Decree which imposed an absolute ban on further use of the platform for the period January 6th through January 31st.

The decree prescribed all "rallies, parades, be-ins, hootannies, hoedowns, shivaries, and all other public events likely to disturb the studious in their reading and reflection...The Speakers Platform may not be used and no substitute locations on the central campus are authorized." All persons on the campus would be required to show that their presence was "authorized". As a sweetener, acknowledging the sentiments against police presence on the campus, the decree stated that "the large numbers of police on the campus" would be removed, however, some of the "uniformed officers" will be stationed in classroom buildings,

In the January 4th decree, HAYAKAWA insisted that rigid compliance was his intention, unlike his more lenient treatment of those who disregarded his directive of the prior month

The January 6th decree provoked even greater anger on the part of the students and faculty and broadened the support for the strike.

On January 23, 1969, the leaders of several student organizations consisting of members of racial and ethnic minorities held a rally on the Speakers Platform. Over a thousand of the students and faculty members attended, Shortly after the rally began, a college administrator ordered all to disperse. Concurrently, two large contingents of policemen known as the Tactical Squad established lines in strategic locations which prohibited the attendees from dispersing or otherwise demonstrating around the campus. The Tactical Squad then arrested over 400 students, beat many and hauled them all off in vans which stood ready for that purpose. They were all booked, fingerprinted and photographed. Most were jailed and humiliated for hours and days.

The charges against the students varied. Some were charged with resisting arrest, others for unlawful assembly (California Penal Code, Section 408), breach of the peace (Sections 406 and 407), and failure to disperse (Section 409).

Expectantly a number of civil suits arose from this unconstitutional conduct on the part of the administration in concert with the City Police. For example, the California State Supreme Court, *In Re Brown*, 510 P.2d. 1017 (Cal. S. Ct., 1973), cert. denied, 416 U.S. 950 (1974), held that the arrests were unlawful as to each and every violation which formed the grounds for the 10 defendants convictions in that case. Subsequent disciplinary actions by the College against many, if not all, arrestees was invalidated in *Wong v. Hayakawa*, 464 F.2d. 1282 (9th Cir. 1972), because the evidence used to discipline the students was held not relevant to the particular student. The plaintiffs in *Wong* also challenged the constitutionality of Hayakawa's Decrees and the absolute ban of January 6 as abridgements under the First, Fourth and Fifth Amendments. However, before decision in that case, Hayakawa rescinded the regulations and thereby successfully mooted the constitutional issue respecting them.

The instant case embraces the issues determined in those cases and, would embrace the issues determined in still another suit, *Carrillo et al. v. Hayakawa*, (Index No 50808, U.S. Dist. Ct., N.D. Cal., June 21, 1969), had that court made a determination to give class status to the plaintiff's claim respecting arrests.

In their original complaint filed in or about March 21, 1972, plaintiffs brought suit in their own behalf and on behalf of others, similarly situated alleging a conspiracy by "threats, intimidation and other unlawful means" to deprive black students at the college of their

"right, privilege, opportunity and the means" to remain matriculated at the college and participate in student activities. Amongst the acts alleged in pursuit of the conspiracy was maintenance by the college administration of a blacklist containing the names of plaintiffs, black and white and others, and another list containing the names of professors and instructors, They sued for a declaratory judgment. In addition, they sought an injunction as to the continuing conduct, as to student elections controlled by the administration and from reappropriation and expenditure of sums allocated to or under the control of the associated students. Further, they included a prayer for damages and urged the Court to place the College in receivership.

On August 15, 1972, they filed their first amended complaint. In this complaint, they specifically identified the class on whose behalf they were bringing the action as all students, student organizations and the faculty. In their prayer they demanded higher damages than in the original suit. They also sought declaratory judgment as to the rights of the various parties in relation to the enumerated conduct of the defendants and "that defendants be enjoined from any further termination of the employment of any faculty members, from any further use of "blacklists", and any further expulsion or suspension of black students";

> "f. That all faculty, administrators, and students terminated pursuant to said conduct be

reinstated with full rights and privileges,"

The Second Amended Complaint, dated February 18, 1975, had as a "first count" allegations respecting the mass arrest of students on January 23, 1969. They alleged that the arrests violated the plaintiffs' rights to peaceful assembly and free speech under the First Amendment, deprivation of right to "freedom from arrest, except under probable cause" as guaranteed by the Fourth Amendment and the Fourteenth Amendment. The second amended complaint also referred to the blacklist but did not name PETER PURSLEY as a representative party. At the time of that complaint, the trial court determined to certify a subclass defined as follows:

> "Those persons whose names appear on a list, originally attached to a memorandum signed S.I. HAYAKAWA, dated February 17, 1969, or on amend d official lists subsequently issued containing additional names, and who were denied employment because their names appeared on said lists and who would have otherwise obtained employment in a college employment program."

The relief they sought prayed for reinstatement of terminated students and faculty.

The First Cause of Action in the Instant Case

In their Third Amended Complaint, filed February 4, 1976, the plaintiffs, JACKSON, ET AL., sought class

certification of their first cause of action. In that complaint, plaintiff alleged that the defendant, HAYAKAWA, and the college administration entered into a scheme and conspiracy, with the City of San Francisco Police Department to deny and deprive the class members their constitutional rights under the First, Fifth and Fourteenth Amendments. These constitutional rights were infringed when on January 23, 1969, HAYAKAWA, summoned the police to the campus where they stood ready and did arrest en masse over 425 students who were peaceably assembled for a rally and demonstration in support of a student strike led by the black students and the BLACK STUDENTS' UNION.

The trial court granted the defendants' motion for summary judgment on the following grounds; That the statute of limitations bars the action since the arrests occurred on January 23, 1969 and the original complaint had not been filed until March 21, 1972. The applicable state statute of limitations for civil rights actions under 42 U.S.C., Section 1983 was held to be 3 years from the time of the 1983 violation. The court held alternatively that under the principle of res judicata the prior suit of *Carrillo v. Hayakawa*, since brought as a class action, bars the instant claim.

The Appeals court upheld the summary judgment on principles of res judicata and saw no need to ascertain the appropriateness of the dismissal by the trial court on grounds of the California statute of limitations.

The Second Cause of Action

In their second cause of action, plaintiff PURSLEY was named for the first time. He and the plaintiffs DANIELS, GREENE and SIMMONS alleged that subsequent to the mass arrest on January 23, 1968, and on February 17, 1969, a black list and amended blacklist of arrestees and supporters was compiled by the defendant, HAYAKAWA, and persons acting under his control and direction. The blacklist was used to punish, bar employment and otherwise deny equal protection to those persons listed. The intention of non-employment was explicit in a cover statement of policy authored and signed by HAYAKAWA which circulated to administrators, professors, college employers and student officers as well as to others outside the academic community. (App. 4) The blacklist included the names of students and faculty members. The trial court denied the claims of DANIELS, GREENE and SIMMONS in that notwithstanding the fact that they were named on the blacklist, they could not show actual loss of employment. With regard to PURSLEY, it held that although denied employment because of the blacklist his claim was barred because he did not become a named plaintiff in time to obtain relief on his individual claim. In particular, the court noted (erroneously under the circumstances) that PURSLEY was informed he would not be rehired on March 6, 1969. The original complaint was filed on March 21, 1972. Therefore, *due to a period of a*

mere 4 days, his claims were held barred under the California 3 year statute of limitations on claims under 42 U.S.C., Section 1983. The court further held that since PURSLEY'S individual claim was barred, the claims of the class members was barred notwithstanding that the class action was timely brought. The Appeals Court affirmed the summary judgment on this cause of action.

The Third Cause of Action

The trial court granted summary judgment on the Third Cause of Action as well. However, the Court of Appeals reversed that decision, based on the awaited decision of *Wong v. Hayakawa, supra.* This cause, therefore, is not included in this petition.

The Fourth Cause of Action

Petitioners did not appeal the trial courts grant of summary judgment in the Fourth Cause of Action. Therefore, this claim is not included in this petition.

The Fifth Cause of Action

In this cause of action, plaintiffs, JACKSON, BELL, DANIELS, FRAZIER, PHILLIPS, REAMS and all members of the BLACK STUDENTS' UNION (BSU) alleged that in violation of Section 23803 of the California Education Code, the defendant, HAYAKAWA and others in the college administration, conspired and schemed to deprive them of their rights to

due process and equal protection under the Fifth and Fourteenth Amendments. In particular they claimed that the defendants disapproved student budget as it related to the BSU thereby reducing the amount of money allocated to it to operate this tutorial program for urban high school youngsters and refusing to disburse salaries to those students employed by the BSU. The unlawful purpose was to punish the BSU for its involvement during the earlier student and faculty strike against the administration. No white student or organizations run by white students similarly involved in the strike were deprived of funds or denied salaries. Therefore, the plaintiff's rights under the Civil Rights Laws, 42 U.S.C., Section 1983, were also violated.

The trial court granted the defendant's summary judgment motion on this claim as well as holding that BSU received "more funds than it was entitled to and in fact... a disproportionately large share of available funds. Therefore, it was not subject to discrimination and its 'expectations' of greater funding is not a claim upon which relief can be granted." The Appeals Court affirmed the summary judgment on this claim:

REASONS FOR GRANTING THE WRIT

According to a Staff Report to the National Commission on the Causes and Prevention of Violence, San Francisco State College, a forerunner in educational innovation and student self-government, became from October,

1968 to April, 1969, "the scene of violence unmatched in the history of American higher education. The campus became the first to be occupied by police on a continuous basis over several months.* A prime consequence of the turmoil was a virtual extinction of the constitutional rights of students and faculty alike by the acting President of the College, SAMUEL I. HAYAKAWA and the college administration.

The rights which the plaintiffs for their first cause seek to vindicate are constitutionally fundamental: the right to free expression and association. On two occasions, December and January, the defendant, HAYAKAWA, promulgated broad and absolute prohibitions against student rallies and demonstrations in hopes of breaking the strike. Those "decrees" were violative of the Constitution on their face. In this light, his bad faith was established *prima facie.* But he did not limit his conduct to these relatively ineffective regulations. He used the disregard by the students of those regulations to summon the San Francisco Police to the campus in the morning in anticipation of the noon day rally and demonstration.

*The report is entitled "Shut It Down!" A College in Crises San Francisco State College, October, 1968 -April, 1969, prepaid by William H. Orrick, Jr. (June, 1969).

During the rally the speakers had addressed those assembled for less than 15 minutes when, at HAYAKAWA'S behest, the police encircled them, beat and arrested them. Plaintiffs maintained that the arrests were in furtherance of a conspiracy and scheme to violate their civil rights and the civil rights of members of their class.

The factual background of this case compels the attention of all lovers of our Constitution. It also exposes a calculated disregard of this Court's existing precedence by the state Attorney General, the Trial Court and the Ninth Circuit of Appeals.

The abrupt dismisal of this meritious case was a tragic blight on the administration of justice and a set back for democracy. It was a flimsy sham and smoke screen decision that was less human and less generous than any legal apology as applied to student civil rights. The courts below have allowed respondents to operate above the law-legibus solutus-and petitioners could find no real security under our Constitution: it was a counterfeit constitution, which means there is no security, no order, no peace and no real freedom for anyone. It is the deplorable truth that the courts below slyly manuevered to politically dispose of this because respondents hold office in government, and summary judgment was used as the legal vehicle that would enable them to escape the penalty for their brutality and lawlessness. The courts below would allow respondent

to "tear up the Bill of Rights" as though our constitution was a document of "octroyee" of the 19th Century Restoration, - a constitution gratiously given to us by the king. This is not a case in an exercise of Zoroastrian theology, the struggle between the forces of darkness and light. There were clear factual disputes and a series of fundamental constitutional questions for a trier of fact. Petitioners were entitled to have "their day in court."

1. THE DECISION BELOW VIOLATES DUE PROCESS BY GIVING BINDING EFFECT TO A PRIOR SUIT, *CARRILLO* ET AL V *HAYAKAWA*, ET AL, WHICH HAS NEVER CERTIFIED AS A CLASS ACTION NOR WAS NOTIFICATION OF THE SUIT EVER MADE TO PETITIONERS

The extension of binding effect of the prior suit to plaintiffs as absentees in the prior suit had no basis because the certified record in *Carrillo* clearly shows that the Court made no finding of class status *either before or after* denying the equitable and declaratory relief sought in that suit.

If plaintiffs were to be bound by the prior suit, than the propriety of class status to that suit should have been adjudicated *prior* to judgment in the merits in order to insulate the class judgment from collateral attack. See Advisory Comm. note, 39FRD 106 (1966) to Federal Rule of Civil Procedure, Rule 23.

This Court still has the task of giving guidelines respecting the substantive due process to be afforded absentee class members in class suit. Cf. 89 Harvard Law Review 1318, 1402-1416. The absence of such direction has caused the Trial Court and the Ninth Circuit Court of the Court of Appeals to misconstrue Rule 23's requirements and in so misconstruing, to deny plaintiffs equal access to court.

Moreover, the decision to deny relief to plaintiffs in *Carrillo* was reached on a record that did not go beyond the pleadings and the affidavits of a number of arrestees and the unrelated affidavits of the defendant police and college security forces.*

There is relatively strong policy in favor of protecting a class action judgment against challenges by class members who did participate in the original action. Otherwise. the benefits of the class action will be lost and what has often been time-consuming and expensive litigation will have settled nothing. Moreover, the procedural requirements for a class suit usually are designed to make certain that the application of *res judicata* and collateral estoppel is fair and equitable. Thus, a

* Those same affidavits were held disqualified as a basis for conviction of arrestees since the vandalism they claimed as the basis for disciplinary action against students since they addressed acts had occuring on days prior to January 23. Cf. In re *Wong v. Hayakawa*, 464 F. 2d. 1282 (9th Cir. 1972).

limitation on collateral attack exists and will not bind members when it can be demonstrated that the representation of his or her interest had been inadequate or that some other basic prequisite to class action treatment (e.g., notice) has not been satisfied, and enforcement of the judgment would be inequitable. Notice to absent class members is crucial to this class action since the members of the class are tenuously affiliated and without it the requirements of due process would not permit the judgment to bind unnotified absentees.

Petitioners were denied due process under the Fourteenth Amendment by the District Court's decision that a "prior uncertified class action," for which petitioners received no notice under FRCP Rule 23, either initially, during or after the trial, effectively bars the instant claim respecting the mass arrests *res judicata*. Although the *Carrillo* complaint contained class allegation, a class was not certified by the court. Under such circumstances, those individuals not a party in *Carrillo* should not be bound by that judgment. They had no notices that a lawsuit was brought on their behalf and they had no notice that *Carrillo* would be binding upon them as to any claim for damages they might have raised, but which was not raised therein. Due process requires that those arrested be given notice that the *Carrillo decision would prevent future lawsuits for monetary claims based on the arrest. Mullane v. Central Hanover B & T Co., In Sovereign Camp v. Bolin*, held

judgment is *res judicata* as to all members of the class who were given the requisite notice and opportunity to be heard therein. Because of the binding effect given to the judgment class action the requirements of procedual due process - notice and opportunity to be heard - are critically important. In absence of the notification standards: form, content and manner required by FRCP 23 it was improper to grant summary judgments based on the operation of *res judicata* as a bar.

Contrary to the assertion of the court below, to bind petitioners to such a narrowly drafted uncertified suit allegedly a class action where no notification was given to potential members of the class certainly violates due process rights and cannot be deemed a (vindication) of the mass arrest. The *Carrillo* decision is not binding on petitions nor does it fulfill any of the other requirements for invocation of *res judicata*.*

*Even the three judge court in *Carrillo* cautioned respondents that the *Carrillo* case was "on the narrow issue" challenging the facial validity of the penal codes which was the basis of the criminal prosecution of the 425 arrested on January 23. In ruling upon the motion, the court did not hear any oral testimony, but, rather considered only affidavits submitted by both sides. The court did not conduct a full evidentiary hearing regarding the bad faith allegation set forth in *Jackson*. Based on the affidavits the court concluded that the arrests did not "plainly" establish such bad faith application of the criminal laws to discourage free speech. Petitioners

2. THIS COURT MUST RESOLVE A CLEAR CONFLICT BETWEEN TWO CIRCUITS -THE NINTH AND DISTRICT OF COLUMBIA RESPECTING ITS PRECEDENTS IN *AMERICA PIPE & CONSTRUCTING CO. V. UTAH.*

By memorandum and order dated August l, 1975 District Judge Robert Peckham made a determination giving class status to the plaintiff's second cause of action. In that cause, the plaintiff's alleged *and the defendant Hayakawa admitted* that on or about February 17, 1969, he authorized, distributed and utilized a blacklist which included the names of all arrestees - students and faculty alike - as well as those members of the academic

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herein must be given the opportunity to present their case fully, including cross-examining respondents' witnesses, who were in violation of the standards set forth in *Wood v. Stickland* 420 U.S. 308; (1945). Since the plaintiffs in *Carrillo* had no such opportunity, *Carrillo* cannot be considered a final decision on the merits to invoke the *res judicata* doctrine as bar to the mass arrest set forth in the first claim herein. *Carrillo* does not in any way preclude a finding that respondents here are not liable for damages pusuant to the standards set forth in *Wood v. Stickland supra.* Under those guide lines the courts below were required to examine *inter alia* the question of whether the California Penal Code sections were unconstitutional as applied in the arrest in question. This question was not resolved in *Carrillo,* but rather in Re *Brown,* 9 Cal. 3d 613 (1973).

community who vocally expressed support of the student strike and were arrested. The purpose of the list was to punish those listed by terminating, refusing to hire or otherwise deny employment at the college to them.

Clearly, the very existence of the list established *prima facie* a violation of the blacklisted persons First and Fifth Amendment rights. A number of those blacklisted were in fact denied employment. On that basis, summary judgment should have been granted to the plaintiffs. Instead, the Trial Court with the affirmance of the Court of Appeals granted summary judgment to the defendants on the grounds that the claim of the only named plaintiff, Instructor PURSLEY, who could establish that he was punished was time barred. It held that PURSLEY'S "informal" efforts to seek reinstatement* did not meet the "timely notice" requirement for equitable tolling to apply. In so holding, the Court did not give full regard to the liberal construction given the doctrine of equitable tolling by the California Courts.

More recently, a case analogous on its facts to the first cause of action in the instant case, but more relevant to the second cause of action on the law, was decided favorable to the plaintiff in *McCarthy v. Kleindienst,* 562 F. 2d, 1269 (Ct. of App. Dist. Col., 1977). In that

*"see Appendix 4 Declaration of Peter Pursley"

case, the plaintiffs sought injunctive relief and monetary compensation for themselves and for a class consisting of all persons unlawfully arrested during a vigil in Washington, D.C.. The suit was filed as a class action on May 1, 1972 based on tortious acts occuring on May 3, 1971. The statute of limitation for the tort was undisputedly recognized as one year. Thus the plaintiffs filed their suit only two or three days prior to the running of the statute. A decision on the defendant's motion for a summary judgment was stayed for nearly three years while the Trial Court awaited a ruling by the Court of Appeals respecting the same issue in a related case.*

*In the instant case, two other related cases were pending in the state court which would be determinative of issues in the instant case. Cf. *In Re Brown*, et al. on Habeas Corpus, wherein, respecting the first cause of action, the California Supreme Court stated:

There is no substantial evidence sufficient to justify a finding by the jury that the petitioners or any of them assembled with the purpose of doing an unlawful act and separated without doing it or advancing toward it. An unlawful act within the meaning of Section 407, as the Attorney General concedes, means criminal conduct prohibited by state law. The evidence is such that a jury would be required to find either that the petitioners did not assemble to do an unlawful act or that they did so assemble and that they accomplished the unlawful act or advanced toward it. This is because the only evidence that they assembled to do an unlawful act is their presence at and conduct during the demonstration; such

When the Court of Appeals ruled in the related case favorable to plaintiffs in *McCarthy*, plaintiff then moved to have their action certified as a class action. The Court denied certification. The following day, 266 arrestees sought to intervene. The Court held their intervention untimely. On appeal, the Court of Appeals acknowledged as critical precedent on this issue this court's decision in *American Pipe and Construction Co. v. Utah, supra.* In that case, this Court stated:

> " We are convinced that the rule most consistent with federal class action procedure must be that that commencement of class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action". 414 U.S. at 553-54.

This court concluded that the statute of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded, and witnesses have disappeared." 414 U.S. at 554, quoting Order of *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348 (1944).

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presence of conduct cannot logically furnish an inference that they assembled to do an unlawful act and at the same time an inference that they did not advance toward it or accomplish it. 510 P. 2d. 1017 (Cal., June 18, 1973), Cert. denied, 416 U.S. 950 (1974).

In holding that Pursley did not meet the "timely notice" requirement for the doctrine of equitable tolling to apply, the courts below wholly disregarded the doctrine of equitable tolling as construed by the California courts.

In holding that "Pursley himself had no administrative remedies...the only avenue open to him personally was the courts", the Court of Appeals has embraced a policy which invites aggrieved faculty members to bring claims involving questions of qualifications to teach directly to court and which discourages such persons from seeking academic administrative redress of grievances. Such a policy toward faculty claims which do not involve Title VII of the Civil Rights Act of 1964 as amended is highly questionable for the following reasons: such a policy contravenes the doctrine of exhaustion of administrative remedies which is especially appropriate for academic exhaustion in institutions of higher education; such a policy is highly inconsistent with the broad and longstanding rule of judicial non-intervention in academic affairs; and such a policy discourages individual faculty and institutions from pursuing administrative resolution of academic disputes in cases where it could be said that established formal grievance procedures are imperfect.

Even assuming Pursley's claim was barred by the statute of limitations, the class claim should not have been dismissed. As to this claim, a class was certified on

August 4, 1975. The courts below have not responded to petitioners argument in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) where this court held that although the named representative of a class may no longer have a personal interest in the outcome of litigation in a certified class, "...the cause of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named representative." The court has dismissed a certified class designed to protect the rights of those persons who were denied employment because of the usuage of the blacklists memos.* However, if this court resolves the clear conflict between two circuits - the Ninth and the District of Columbia respecting its precedents in *American Pipe & Construction Co. v. UTAH* both the name representative and the class claims will survive.

3.IT WAS IMPROPER TO GRANT SUMMARY JUDGMENT WHEN THE FACTS SHOW PRIMA FACIE CASE OF RACIAL DISCRIMINATION

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*The courts below did not comply with FRCP 23(e) providing individual notice to all members of the class before a dismissal. Individual notice to all members of the class was mandatory and this is just another example where the court has once again misconstrued the application of Rule 23.

There was sufficient evidence of disparate treatment of those black students employed by THE BLACK STUDENTS' UNION to show *prima facia* a genuine issue of fact as to the defendant's intent in reallocating the student budget to support a trial on the merits.

Respondent brought this action to redress deprivation of rights guaranteed by 42 U.S.C. 1981 et, seq. and the Fifth and Fourteenth Amendments to the United States Constitution. 42 U.S.C. 1983 the Civil Rights Act of 1871 also known as the Ku Klux Klan Act was passed pursuant to the Fourteenth Amendment, which provides that:

> No state shall make or enforce any law which shali abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, property without due process of law;

Likewise, 42 U.S.C. 1983 provides:

> Every person, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or cause to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by

> the constitution and laws, shall be liable to the party injured in an action at law. suit in equity. or other proper proceeding for redress.

Appellants allege that upon the termination of the receivership punitive guidelines were imposed on the student body government by respondent.

The Associated Student organization sets the stage for student politics at San Francisco State University. It is a non-profit California corporation organized for the purpose of providing a student government at the campus to engage in educational and charitable programs and activities for the benefit of its members, the students at San Francisco State. The president of the Associated Students and all members of the Student Legislature are freely elected by the students at San Francisco State at an annual election, traditionally held in the spring.

Articles II, Governmental Organization, Section 1, provides for a Board of Directors ultimately responsible for the maintenance of this association as provided for in the Articles of Incorporation, which shall meet at least once annually for the purpose of conducting business appropriate to the Articles. The Board of Directors control the employment of students of the Associated Student Government. It composes of nine voting members, one of whom is a faculty member and another ia a representative of the university administration.

At the commencement of the Fall semester of 1970. The Black Students' Union, like other clubs and sororities, satisfied the statement of purpose to qualify as a student body organization. It was a bona fide campus organization that was officially registered with the Dean of Students. However, respondents maintained that because BSU participation in leading the student faculty strike the Associated Students would no longer be able to employ Black Students' Union members.*

The administration appears to have had a twofold purpose in its direct interference in the Associated Student organization, student body organization under the California Education Code, Sections 1, 23803, 24054, 42401 and 42402. Those purposes were to direct student funds to less controversial student organizations notwithstanding that the programs operated by those organizations - tutorial for urban youngsters of high school age and remedial reading - were basically uncontroversial. Thus, the administration pressed for recogni-

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Exhibit 2 in the First Amendment Complaints from Nancey Schroder Chairman of the Finance Committee explain to petitioners the reason why minority students were being prohibited from employment positions. in addition, answer to interrogatories of Associated Student President Jon Twichell shows complaints that respondents were using double standards as it related to the employment of black students.

tion of athletics and the arts as the basis for student fee allocations. Cf. *Associated Students vs. Board of Trustees of California State Universities and Colleges,* 56 C.A. 3d. 667; 128 Cal. Rptr. 601 (March 29, 1976). The other purpose was an expectation that the BSU's political effectiveness could be diminished if not extinguished if the community-oriented programs which made the organization popular amongst students and faculty members could be curtailed or eliminated. In pursuit of this latter purpose, it withheld the salaries of the black students employed in those programs. White students employed in programs operated by white operated organizations were not similarly treated.

In the Fifth Claim, appellants allege that respondents, illegally and in a discriminatory manner, deprived certain black students and the members of the Black Students Union salaries for which they were entitled pursuant to the Associated Student Budget for the School Year September 1970-71. In particular, Petitioners have contended that the Twichell Administration were the "appropriate student officers" under state law that was responsible for the allocation of student funds for the academic year 1970-71. Such student body officers refused to comply with the discriminatory guidelines imposed on the student body organizations and did employ members of the Black Students Union. Petitioners were hired and performed the work within

their program in their designated position from September to December, 1970. They were not, however, compensated for the work performed as were the white students similarly situated. Respondents did illegally and without authority misapproriate student fees, in order to divert the official allocation of monies from black students employed in the Associated Students budget 1970-71. The strategy was adopted to prevent the programmatic participation and employment of black students union members in retaliation for leading the strike two years prior.

Table 1 below shows the differential treatment of black and white students employed by the Board of Directors of the Associated Students program for the Fall semester of 1970. Black Students Union members Bell, Daniels, Frazier, Phillips and Reams were active in the BSU during and after the strike. This table supports the BSU allegation that the respondents applied double standards and that from the period of September, 1970 through December, 1970 the respondents refused to compensate the black employees for the work they performed that was similiar to the work performed by white students. The table shows that of the $197,959.00 mandatory fees made available to the student body government, approximately $17,884.00 was allocated for those students employed in programs categorized as "Associated Student Programs," which were the pro-

grams developed to provide services to the general student body. Of this $17,884.00, the balance sheet ending December, 1970, which was a part of interrogatory IV C thru C6 pp 13-14 submitted by respondent DELAND, shows that of the $11,160 spent for white student employment at the end of the semester, approximately $3,623.40 had been spent on the employment of white students while comparatively disparate treatment was given to black students, as the same balance sheets show that of the $6,724.00 allocated for the employment of black students, approximately $ -0- was expended by the end of the semester.

TABLE I

Associated Students Programs

Employment Title	Race	Student Government Allotments	Balance Sheet Expenditures Dec. 1970
1. Communication Dir.	White	$1,612.00	$644.40
2. Performing Arts Dir.	White	$1,612.00	$796.80
3. Child Care Dir.	White	$1,612.00	$675.60
4. Students Service Dir.	White	$1,612.00	$614.40
5. Foreign Students Dir.	White	$1,900.00	$595.20
6. Draft Counselor	White	$1,200.00	$297.00
7. Draft Counselor	Black	$1,200.00	-0-
7 & 8. Legal Fundraisers (2)	Black	$2,616.00	-0-
10. Legal Referral	Black	$1,600.00	-0-
11. Proposal Writers	Black	$1,308.00	-0-
Total White Employment	6	$11,160	$3,623.40
Total Black Employment	5	6,724	-0-

Total Employment	11	$17,884.00	$3,623.40

Source: Evidence obtained from answer to respondent Delands interrogatories II No.2 A p.6, Q p.11. Interrogatory IV No.1 A thru C6 pp 13-14, Interrogatory No. IV No.2 A thru B(1) p. 15, and answer to respondent Harkness's interrogatories III C thru D(1) p.6, Interrogatory V A thru D pp 9-10, Interrogatory VI A thru R p. 10-14. Plus, the affidavits of Black Students Union members Phillips, Frazier, Daniels, Bell, Reams submitted with the original complaint.

Table 2 below: The California Administrative Code, Article 4, entitled "Student Body Organizations," provides for payment of employment for services in connection with the general administration of student fee programs pursuant to applicable salary schedules. This table proves the number of student officers who were employed by the student government. It includes a total of seven, two of whom were black and were not compensated for the work they they performed for the period of September, 1970 - December, 1970 as the white students were. Once again we see the disparate treatment given to black students during this period; such differential treatment between black and white students in employment became the basis for the BSU allegation of racial discrimination.

TABLE 2
Employment of Associated Student Officers

Employment Title	Race	Student Government Allotments	Balance sheet Expenditures Dec. 1970
1. Communications Dir.	White	$1,612.00	$644.40
2. Performing Arts Dir.	White	$1,612.00	$796.80
3. Child Care Dir.	White	$1.612.00	$675.60
4. Foreign Student Dir.	White	$1,900.00	$595.20
5. Student Activities Dir.	White	$1,612.00	$614.00
6. Tutorial Coordinator	Black	981.00	-0-
7. Tutorial Clerk Typists	Black	$ 981.00	-0-
Employed Student Officers:			
Total white employment	5	$8,348.00	$3,326.00
Total black employment	2	$1,962.00	-0-
Total Employment of Officers	7	$10,310.00	$3,326.00

Source: The same sources of data compiled from Table 1, in addition to the affidavits of Black Students' Union members Donald Craig and Scottie Dawson attached to the original complaint.

Table 3: At the commencement of the Fall semester, 1970, the first persons employed are the Associated Students staff who do the administrative work for the student body organization. This table shows the disparate treatment of black student Charles Jackson, who was employed by the student government, but the administration would not allow this Black Students' Union leader to receive his salary as did the white students who were similiarly situated.

TABLE 3

Associated Student Staff Employees

Employment Title	Race	Student Allotment	Expenditure Bal. Sheet Dec.70
1. Administrative Assistant	White	$2,280.50	$1,892.30
2. Secretary	White	$5,349.25	$1,566.61
3. Coordinator of Student Programs	Black	$2,847.60	-0-

Source: The information and data compiled in Table 1, in addition the affidavit of appellant Charles Jackson of the original complaint

Respondents failed to show that these factual issues were not in dispute. They made reference to certain vague answers to interrogatories which show that funds were allocated to BSU members as shown in Tables 1, 2 and 3, but they failed to demonstrate their significance in connection with the BSU allegation of the double standards in employment. It is the burden of the moving party to present information that clearly demonstrates that there is no factual dispute regarding the matter upon which summary judgment is sought. It is often said that the motion must show "that there is no genuine issue as to any material fact" (see Federal Rule 56c.) Here the moving party and the courts below failed to address themselves to the issue of racial discrimination in employment. Summary judgment is a harsh method of deciding this case. It denies petitioners their day in court.

The courts below have exhibited a steadfast determination not to address the actual issues raised in the Fifth Cause of Action. Instead, they urge that discrimination cannot take place where some benefit has been received by a minority group. Discussing hypothetical situations that bear no relevance to the issue raised by petitioners. In support of the motion for summary judgment, the court referred to general answers to interrogatories relating to the budgets and never did cite a specific interrogatory. The court did not address itself to the issue of racial discrimination in employment. We do not believe that these factual issues can be resolved by reference to general exhibits attached to answers to interrogatories. Respondent did not satisfy their burden of showing the absence af any genuine issue of material fact, and were not entitled to summary judgment. Neither the Court below nor respondents have considered that petitions, were hired by the student government officials as were the white students similarly situated and as affirmed by the student budget of September, 1970 - December, 1970, performed work from September to December of 1970 just as did their white counterparts hired by the student organization. Yet, only these black students each of whom were members of the Black Students Union were

not paid for the work they performed. The failure to pay petitions is no less illegal and no less discriminatory because the Black Students Union received funding.

To grant summary judgment in this instance is to evade important fundamental constitutional issues of due process and equal protection rights, and widely departs from the accepted course of judicial proceedings for granting summary judgment motions.

> A genuine issue of fact therefore existed respecting the motivation of the College Administration for the disparate treatment of black students Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
>
> Even assuming the disparate treatment was retaliatory, it constituted an abridgement of the black students constitutional rights under the First, Fifth and Fourteenth Amendments. Cf. *Healy v. James*, 408 U.S. 169, 198 (1972).

CONCLUSION

For these reasons, a writ of certiorari should be granted.

APPENDIX 1

OPINION IN THE APPEAL FROM THE UNITED STATES DISTRICT COURT TO THE NINTH CIRCUIT COURT OF APPEALS

Before: TRASK and ANDERSON, Circuit Judges, and WYATT, District Judge.

ANDERSON, Circuit Judge:

This civil rights case arose from the campus turmoil which occurred at San Francisco State College (now known as California State University, San Francisco) in late 1968 and early 1969. The district court granted summary judgment in favor of the defendant college officials. The plaintiffs (a former instructor and students at the college) appeal, raising questions involving the statute of limitations, res judicata, and the sufficiency of their pleadings. We affirm in part and reverse in part.

BACKGROUND

In the fall of 1968 the Black Students' Union initiated a student-faculty strike at San Francisco State College (College). On January 23, 1969, there was a rally

had been imposed earlier by S.I. Hayakawa, the then President of the College. After the rally had begun, one of the College officials attempted to have the crowd disperse. A San Francisco police officer then informed the crowd that the meeting was unlawful and ordered everyone to leave the area. After these warnings were ignored, the police arrested over four hundred people. All of those arrested were charged with violations of California Penal Code §§ 408 (unlawful assembly), 409 (failure to disperse), and 415 (disturbing the peace).

A number of suits were filed as a result of these arrests and the disciplinary proceedings which were conducted by the college. 1/ In *Carrillo v. Hayakawa*, No. C-50808 (N.D. Cal. June 27, 1969), a declaratory judgment action was filed on behalf of all those arrested, challenging both the constitutionality of the state statutes under which everyone was arrested, and their application. A three-judge federal court rejected both arguments. There was no appeal. The district court held the statutes were not unconstitutional on their face and also were not enforced in bad faith so as to discourage plaintiffs from exercising their First Amendment rights. In *Wong v. Hayakawa*, No. 50983 (April 24, 1969), the disciplinary proceedings conducted by the College were challenged. The district court found that the arrested students were given notice and a sufficient hearing to meet procedural due process notice and hearing requirements. It found, however, that due process was

violated in the limited instance where the decision to discipline was based solely upon a police report that did not show any evidence of misconduct on the part of the plaintiffs. The court then issued an affirmative injunction, ordering the University to expunge from plaintiffs' school records all reference to disciplinary action and to reinstate plaintiffs as students. The court also suggested that the same be done for all students who were disciplined solely on the basis of the police report. This court, on appeal, affirmed the order of the district court, *Wong v. Hayakawa*, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

The present action was originally filed on March 21, 1972. The first complaint was filed by one former black student and two black student organizations. Amended complaints adding plaintiffs and new claims were subsequently filed. It was determined that the action might be maintained as a class action in respect of the second of the five claims, but not otherwise (Fed. R. Civ. P. 23(c)(1)). The court below granted summary judgment on all five claims of the Third Amended Complaint which had been filed on December 17, 1975.

The plaintiffs appeal from the adverse judgment on four of their claims. One claim involves the allegation that the mass arrests were unconstitutional. Another deals with a blacklist circulated at the College which barred all those arrested from employment. The third claim stems from the College disciplinary proceedings

against those arrested. And the final claim on appeal involves allegations by black students who allegedly were not paid for work performed for the College. Since each claim implicates different issues, we address each separately.

DISCUSSION

Standard of Review

In reviewing the summary judgment granted by the court below, this court will affirm the judgment only when it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The record and the inferences derived therefrom are reviewed in the light most favorable to the non-moving party. *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1254 (9th Cir. 1976); 10 Wright and A. Miller, *Federal Practice and Procedure* (West 1973), Section 2716.

Mass Arrests

This, the first claim, is based on the arrests of the people who attended the campus rally on January 23, 1969. Plaintiffs Greene and Simmons brought it as a class action on behalf of all those who were arrested at the rally. The essence of this claim is the allegation that the College officials, along with the San Francisco

Police, engaged in a conspiracy to deprive the plaintiffs of their First Amendment rights by having them arrested. In turn, this is dependent upon the implicit assertion that the statutes under which the arrests were made (§§ 408, 409, and 415) were applied without good faith and for the purpose of depriving plaintiffs of their First Amendment rights.

The court below granted summary judgment on this finding that it was either barred by the statute of limitations or res judicata. Because we find ample grounds to support summary judgment based on principles of res judicata, we do not decide whether summary judgment was appropriate under the alternative ground of the statute of limitations.

In *Carrillo v. Hayakawa*, No. C-50808 (N.D. Cal., June 27, 1969), a three-judge federal court rejected a similar challenge to the validity of the mass arrests. The plaintiffs in *Carillo* brought their suit on behalf of themselves and others similarly situated challenging the constitutionalty of the January 23 arrests. The court found that the arrests under §§ 408, 409, and 415 had not been conducted in bad faith.{

Under the principles of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore*, ____*U.S.*____, *58 L.Ed.2d 552, 559 n.5 (1979); Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 932 58

L.Ed.2d 327. On appeal, the plaintiffs argue that *Carrillo* 3/ did not involve either the same cause of action or the same parties. 4/

The plaintiffs concede that *Carrillo* presented and decided the issue of whether the California criminal statutes which were used in the mass arrests were applied unconstitutionally and in bad faith to discourage the First Amendment rights of free speech and assembly. Nonetheless, the plaintiffs contend that the question of whether the California criminal statutes "were unconstitutional as applied to the arrests in question" was not resolved in *Carrillo*. We are unable to perceive any meaningful distinction between the issue decided in *Carillo* and the issue presented in the present case. The rights sought to be vindicated remain the same, the passage of the years has not altered their character in any way. Both cases arose out of the mass arrests which occurred on January 23, 1969. Although damages are sought here, whereas declaratory relief was sought in *Carrillo*, the issues are identical. *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 890-891 (3d Cir. 1973) (Van Dusen, J., concurring). Both cases involved the question of whether the defendants had applied the California criminal statutes in bad faith in violation of the constitutional rights of those arrested.5/

Plaintiffs argue that the parties to the *Carrillo* suit are not the same as those involved in the present case.

They claim that *Carrillo* involved different plaintiffs. 6 Although the named plaintiffs may have been different, we otherwise disagree with this contention. Initially, courts are no longer bound by rigid definitions of the parties or their privies for the purposes of applying collateral estoppel or res judicata. *See Montana v. United States, ____U.S.____, 59 L.Ed.2d 210, 216-218 (1979); and Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-1384 (9th Cir. 1978). *Carillo* was brought on behalf of all those who were arrested on January 23 at the College. It was brought as a class action and treated by the court as a class action. 7/ Virtually all of those arrested were represented by counsel in the *Carrillo* case. 8/The plaintiffs fail to raise any other arguments as to why this claim should not be barred by res judicata. *See Montana, supra*, 59 L.Ed.2d at 222-223.

Based on the principles of res judicata, we conclude that summary judgment was properly entered on plaintiffs' first claim.9/

The Blacklist

The second claim for relief is based on the blacklist. Hayakawa had a list of all those who had been arrested prepared and circulated throughout the College. In an attached cover letter, signed by Hayakawa, it was explained that anyone whose name appeared on the list would thereafter be ineligible for employment at San Francisco State.

This claim was brought on behalf of all those whose names had appeared on the blacklist and who had been denied employment as a consequence of such listing. Only one named plaintiff, Peter Pursley, was found to have standing. Pursley was employed as a psychology instructor in the fall of 1968, but was not rehired for the following semester. Pursley did not become a plaintiff until December 1975.

The court below found that Pursley's claim was barred by the statute of limitations since he was notified that his employment was terminated on March 12, 1969, and the present action was not filed until March 21, 1972.

Since §1983 does not contain its own statute of limitations, federal courts look to the state statute of limitations which applies to the most similar state cause of action. *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978); *Briley v. State of California*, 564 F.2d 849, 854 (9th Cir. 1977). When a §1983 cause of action is brought in California, §338 (1) of the California Code of Civil Procedure applies.
Bradshaw, supra 569 F. 2d. at 1068; *Briley, supra* 564. F. 2d at 584. This provides for a three year limitation 854. This provides for a three-year limitation period.

Pursley received notice of the termination of his employment on March 12, 1969, and the present action was filed on March 21, 1972. At first glance it appears that his action is time barred. However, Pursley's

department chairman filed an administrative grievance on Pursley's behalf in an attempt to have him reinstated. The final disposition of this informal proceeding did not occur until August 12, 1969. Plaintiffs argue that this administrative procedure tolled the statute so that the period ran until August 12, 1972.

Although federal courts borrow state statutes of limitations in §1983 actions, there is some confusion as to whether state or federal law determines when the claim accrues and whether the statute is tolled. *Bradshaw, supra*, 569 F.2d at 1068; and *compare Briley, supra*, 564 F.2d at 854-855, *with Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and *William v. Walsh*, 558 F.2d 667 (2d Cir. 1977). We need not address this question because the result reached here would be the same under either California or federal law.

Under California law, there is no statute which would toll the limitations period in this case. Therefore, plaintiffs must rely upon the doctrine of equitable tolling which has been developed by the California courts. *See Addison v. State*, 578 P.2d 941 (Cal. 1978); *Elkins v. Derby*, 525 P.2d 399 (Cal. 1944). The doctrine's requirements are: "timely notice, and lack of prejudice, to the defendant, and reasonable good faith conduct on the part of the plaintiff." *Addison, supra*, 578 P.2d at 943-944. We do not need to look any further than the doctrine's first requirement. The pursuit of an informal administrative review seeking reinstatement, brought

by someone other than the plaintiff, does not serve as timely notice that the plaintiff will bring a damage action under §1983, particularly where, as here, the plaintiff does not formally enter the §1983 action until six years after his employment was terminated. We are aware of no California decision granting relief from the limitations period in similar circumstances.

Plaintiffs cite no federal cases which would support a finding that the statute was tolled in the present case. The Supreme Court held that the filing of a Title VII employment discrimination charge with the Equal Employment Opportunity Commissio did not toll the limitatinos period for filing a § 1983 action based on the same facts. *Johnson, supra*, 421 U.S. 454. In *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *petition for cert. filed*, ____U.S.____, 48 U.S.L.W. 3047 (1979), the Fourth Circuit, apparently applying federal law, refused to toll the statute of limitations in an almost identical factual situation. After being notified that she would not be rehired, a university instructor personally pursued her administrative remedies in *Bireline*. She was denied relief and that brought the §1983 action which was found time barred despite the administrative proceedings. 10/

If any claim supports the use of the statute of limitations, the present one does. The plaintiffs initially slept on any rights they had until after the three-year statute of limitations had run. Pursley, the only plaintiff

entitled to relief under this claim, was not brought into the suit until another three years later (six years after his claim accrued). And it is now ten years after the facts giving rise to the claim occurred.

Pursley himself had no administrative remedies. After he received notice of his termination, the only avenue open to him personally was the courts. The administrative procedure involved here was informal. It was brought not by Pursley but by his department chairman We are not dealing with a case where the plaintiff pursued an administrative remedy afforded by statute. As the Supreme Court has observed:

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Johnson, supra, 421 U.S. at 463-464. We believe that any "merit" to the plaintiff's claim is sufficiently outweighted by the competing policy interest of protecting defendants from stale claims.

Thus we conclude that Pursley's claim was time barred whether state or federal tolling law is applied.

Plaintiffs argue that even if Pursley's claim is time barred, the second claim was still improperly dismissed. Relying upon *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *East Texas Motor Freight*

System, Inc., v. Rodriguez, 431 U.S. 395 (1977), they reason that the claims of class members are not mooted or destroyed merely because the claim of the named plaintiff is denied. Those cases are clearly distinguishable. Both *Franks, supra*, and *East Texas Motor Freight, supra*, involved the mootness question under the "case or controversy" requirement of Article III. With the mootness issue the Court was concerned with the problem which arises because of the changes occurring to the plaintiff's position in the litigation. The plaintiff had initially stated a good cause of action but, because of the passage of time, may no longer need the remedy sought as there may no longer be a remedy available. With the statute of limitations we are concerned with the problems which arise because of the plaintiff's delay in bringing suit initially, not changes occurring after suit is filed.

Due to the infirmity caused by the running of the statute of limitations, the court below properly entered summary judgment on the plaintiffs' claim based on the blacklist.

Disciplinary Proceedings

This, the third claim, is based upon the disciplinary proceedings brought by the College against those arrested at the January 13 demonstration. In their complaint, the plaintiffs alleged that their due process rights were violated because of the method used to select

members of the faculty hearing panels, the failure to adequately separate the adjudicatory and prosecutorial roles, Hayakawa's bias, and inadequate notice of the charges against them. The court below granted summary judgment, finding that plaintiffs' claims were barred by the prior suit of *Wong v. Hayakawa*, No. C-50983 (N.D. Cal.), where other students had challenged these same disciplinary proceedings.

Plaintiffs have conceded that *Wong* controls the specific due process violations which they had claimed in their complaint. Nevertheless, they contend that they should enjoy the benefits as well as the burdens of the application of res judicata. While *Wong* found that minimum due process requirements had been satisfied by the disciplinary proceedings, that case also held that there was a due process violation in those cases where students had been disciplined based solely upon a police report that did not provide sufficient evidence to sustain a finding of misconduct. We agree with plaintiffs and believe that res judicata principles entitle them to affirmatively rely upon the limited due process holding of *Wong*.

While acknowledging their failure to raise this properly in their pleadings, plaintiffs contended that since they raised it in their motion for summary judgment, they shoud have been allowed to incorporate it by amendment under Fed. R. Civ. P. 15(b).

We agree with the plaintiffs. 11/ While we do not

condone the type of inartful pleading which occurred here, we believe that the principles of res judicata and the interest in prior judgments are of more importance than the pleading rules in the present case. 12/

Funding of the Black Students Union

Appellants' fifth claim is brought by various individual plaintiffs employed by the Black Students Union (BSU), who allege that the BSU received inadequate funds to pay their salaries because of the BSU's involvement in the campus disorders. Appellants do not challenge the following findings where were made by the district court:

1) The demands for money by various student groups exceeded available funds;

2) The BSU, along with other minority groups, did receive funds; and

3) The BSU received much more than most groups, and in fact received a disproportionate ly large share of the available funds.

C.R. 447. Consequently, we must also agree with the conclusion that:

> "... there is no evidence that the BSU, which recieved proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its 'expectations'

> might have been and what promises might have been made."

C.R. 447. Summary judgment was properly entered on appellants' fifth claim for relief.

The district court's summary judgment is AFFIRMED on the mass arrest (first), blacklist (second), and failure to pay the black students' claims (fifth) claims. The summary judgment is REVERSED on the disciplinary proceeding (third) claim.

FOOTNOTES

1/ In addition to the two federal cases discussed in the text, the California Supreme Court overturned the criminal convictions of some of the students who were arrested. *In re Brown*, 510 P.2d 1017 (Cal. 1973), *cert. denied*, 416 U.S. 950 (1974). The court granted the petitioners' writ of habeas corpus finding that there had been erroneous jury instructions under §415, and that there was no substantial evidence to support convictions under §§407 and 408.

2/ The relevant part of the *Carrillo* decision provides as follows:

> "As noted earlier, plaintiffs also move for a declaratory judgment that §§ 408, 409 and 415 have been applied without just cause for the purpose and with the effect of discouraging the exercise of free speech and assembly. There is no evidence in the record plainly establishing abusive invocation of the state criminal laws for such purposes. Although some plaintiffs have

submitted affidavits making such allegations and cliaming a "chilling" of their First Amendment rights, those declarations have been controverted by the defendants. The record is insufficient to warrant the granting of such relief."

Carrillo, supra, at 9-10.

3/ Plaintiffs also argue that the *Carrillo* decision was not decided "on the merits" since the court there had relied upon affidavits in denying the requested declaratory relief. No authority is cited nor are we aware of any which would support this contention. Summary judgment may be decided on the basis of affidavits; nonetheless it still is a judgment on the merits.

4/ Plaintiffs' arguments against the application of resjudicata remind us of the following observation made by the late Judge Lemmon of this court:

> "'Because there must be an end to litigation, the legal principle of res judicata is a salutary one and should be freely applied,' says the successful litigant.
>
> "'Yes, but--', replies his adversary, 'yes, but *our* case is different. As to *us, res judicata* should not be invoked because, 'etc."

Robinson v. Sidebotham, 243 F.2d 16, 17 (9th Cir. 1957), *cert, denied,* 355 U.S. 867.

5/ The Fifth Circuit uses the following test for determining whether the substance of two different motions is the same for res judicata purposes:

> "Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"

Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 961-962 (5th Cir. 1968). Application of this test to the present case would yield the same result as we reach.

6/ Plaintiffs also claim that the defendants are not the same. The present suit is brought against Hayakawa and other officials of the College. *Carrillo* was against Hayakawa, the San Francisco Chief of Police, and District Attorney, and their agents and employees. The deletion of some defendants from the prior suit, where their interests and involvement were sufficiently similar to that of the defendants named in both suits, and where the rights sought to be vindicated remain the same, cannot serve as a bar to the application of res judicata.

7/ Since *Carrillo* was never certified as a class action, plaintiffs argue that it should not be considered in that light. In view of the considerations set forth in the text, we believe that this would elevate form over substance, which we decline to do in this case.

8/ The district court found that virtually all of

those arrested were represented by counsel or had their interests represented by the public defender who was representing 400 of those who had been arrested. Plaintiffs do not challenge this.

9/ Plaintiffs in the present case are in less of a position to complain than some parties who have been bound by the doctrine of virtual representation. The Fifth Circuit explained this as follows:

> "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."

Aerojet-General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (and see the exhaustive list of cases cited therein where this has been applied).

10/ The court reasoned as follows:

> "While plaintiff was granted an administrative hearing after May 19, 1970, and it may have been appropriate for her to have delayed filing her complaint until after its conclusion, the pendency of the administrative reconsideration did not create a new cause of action; it only made it apparent that if she were to obtain relief it could only come as a result of a successful lawsuit commenced within three years following May 19, 1970."

Bireline, supra, 567 F.2d at 263.

11/ Defendants raise two additional arguments in support of summary judgment in their favor.

First, they claim that the representative plaintiffs were not disciplined by the College and so lacked standing to bring this suit. Plaintiffs controvert this and claim that the named plaintiffs were either placed on probation or reprimanded. We believe that this sufficiently states a "distinct and palpable" injury so as to confer standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Since a dispute exists as to whether the plaintiffs were disciplined, summary judgment cannot be based on this ground.

And second, defendants claim the plaintiffs cannot show that the College officials conducted the disciplinary proceedings in bad faith which is necessary to support a §1983 claim. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). We note that neither *Wong* nor the court below addressed this specific issue, and so summary judgment cannot be upheld on this basis.

12/ We believe this result is consistent with the underlying purposes of res judicata which rest "upon considerations of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

APPENDIX 2

ORDER GRANTING SUMMARY JUDGMENT

The complaint at hand alleges five claims for relief, all of which arise in one form or another from a period of campus unrest at what was then San Francisco State College (SFSC) during 1969 and 1970. The original complaint in this action was not filed until March 21, 1972; the defendants' present motion for summary judgment is directed to the third amended complaint, filed December 17, 1975. Relief is sought under 42 U.S.C. §§1981, 1983 and 1985, and under California law by way of pendent jurisdiction.

THE FIRST CLAIM

The first claim is brought by Greene and Simmons on behalf of a class consisting of 452 persons who attended a campus rally on January 23, 1969, and who were arrested at that rally after an order to disperse had been given. Those arrested were charged with unlawful assembly, failure to disperse, and disturbing the peace. The plaintiffs allege that those arrested were deprived of their rights under the First and Fourteenth Amendments.

It is quite clear, and in fact plaintiffs have themselves argued, that the applicable statute of limitations for these civil rights actions is three years. *Donovan v. Rienhold,* 433 F.2d 738, 742 (9th Cir. 1970). In this case, the alleged deprivation of rights occurred when the arrests were made, on January 23, 1969, and the suit was not filed until March 21, 1972, more than three years after the arrest. Accordingly, the first claim is barred by the applicable statute of limitations.

red by the applicable statute of limitations.

The plaintiffs' assertion that the statute of limitations was tolled pending the outcome of the action *In re Brown,* 9 Cal.3d 612 (1973), is without merit. As indicated below, the legality of the mass arrest was upheld in *Carrillo v. Hayakawa,* (N.D. Cal. 1969, No. C-50808); *Brown* was concerned only with the propriety of certain of the convictions resulting from the arrests, not with the arrests themselves. Therefore, the *Brown* case was not dispositive of the issues in this case, and a federal court hearing an action challenging the arrests would not be required to abstain -- indeed, *Carrillo,* rather than abstaining, did consider and dispose of the arrest issues in this case. Moreover, plaintiffs' cases, e.g. *Fulford v. Klein,* 529 F.2d 377 (5th Cir. 1976), in which §1983 were not allowed while state habeas corpus writs were available, or while appeal from a conviction was pending, all involved situations in which a convicted and imprisoned individual who sought relief pursuant to §1983 had not yet exhausted his habeas and appeal remedies. In the instant case, none of the plaintiffs were involved

in the *Brown* convictions, and there is no indication that any of them were imprisoned, so as to have precluded a §1983 claim for a sufficient period of time to affect the statute of limitation issue. But most importantly, the chief case relied upon by plaintiffs itself precludes their argument. In *Fulford*, the court expressed concern that the statute of limitations might become a problem if the §1983 action were dismissed, and suggested that it should be allowed to remain in court, but be held in abeyance pending the state action (at P. 382). Thus it clearly allowed the filing of a §1983 action to preserve the claim against the statute of limitations, vitiating plaintiff's argument that they were precluded from filing suit.

In addition, it would appear that the asserted claims are precluded, under the principle of res judicata, by the holding of the three judge district court in *Carrillo v. Hayakawa, supra. Carrillo* was a suit brought as a class action on behalf of all persons arrested on January 23, 1969, seeking: i) a declaratory judgment striking down as unconstitutional those statutes upon which the arrests were based, or ii) a declaratory judgment holding that those statutes were enforced unconstitutionally and in bad faith for the purpose and with the effect of discouraging free speech and assembly. The *Carrillo* opinion clearly held that the statutes were not unconstitutional on their face *and* that they were not used to discourage free speech and assembly. Although *Carrillo*

was not certified as a class action, it was clearly treated as such. In any event, the application of res judicata does not depend upon certification where as here, the interests of the parties to the action are so closely aligned with the interests of non-parties as to make the former virtual representatives of the latter. *Aerojet-General Cor. v. Askew,* 511 F.2d 710, 719 (5th Cir. 1975). In this case, virtually all of those arrested were either represented by counsel or had their interests represented by counsel in *Carrillo*(the public defender represented 400 of those arrested). Accordingly, because the *Carrillo* court vindicated the mass arrest (to be distinguished from the subsequent convictions, some of which were overturned in *In re Brown, supra*), the first claim is also barred as res judicata.

Plaintiffs, however, contend that because res judicata and the statute of limitations are affirmative defenses, defendants' failure to plead them amounts to a waiver. F.R.C.P. Rule 8. This contention must be rejected for two reasons. First, as indicated by Wright and Miller, *Federal Practice and Procedure: Civil,* §1277 (1969), a court may permit affirmative defenses to be asserted by motion, especially where the defenses seem likely to dispose of the entire case or a significant portion of the case. Thus, in *Suckow Borax Mines Consol., Inc. v. Borax Consol. Ltd.,* 185 F.2d 196, 204-205 (9th Cir. 1950), it was held that affirmative defenses, although not appearing in the pleadings, may be established upon a

motion to dismiss or a motion for summary judgment, when, by affidavits or otherwise, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law.

Second, pursuant to F.R.C.P. Rule 15(a), this Court has discretion to allow defendants to amend their answer to this, the third amended complaint, filed February 4, 1976, to allege these affirmative defenses. Requiring defendants to go through the motions of amending their pleadings would, under the circumstances, be an empty exercise which would not affect the result; accordingly the Court will treat the affirmative defenses as though they had been pleaded. *United States v. United Air Lines,* 216 F.Supp. 709, 711 (Nev. 1962), where the court, recognizing the futility of allowing res judicata to be raised initially by motion for summary judgment when the party could properly raise it by amending the pleadings, permitted res judicata to be raised on a motion for summary judgment. The soundness of this action is supported by the fact that both parties have had full opporutnity to argue the merits of the two affirmative defenses and have do so extensively, eliminating any claim of surprise or prejudice.

THE SECOND CLAIM

The second claim is brought by Daniels, Greene, Simmons and Pursley on behalf of all persons whose

names allegedly appear on certain lists compiled by defendants for the purpose of denying them employment at SFSC on account of the January 23, 1969, arrests. Plaintiffs have conceded that under *Paul v. Davis,* 424 U.S. 693 (1976), the mere compilation of such a list, absent actual loss of employment, does not state a claim under the Act, and that this precludes the claims of Daniels, Greene and Simmons. With respect to Pursley, who taught in the Fall of 1968 but, allegedly because of the "blacklisting", was not rehired in the Spring of 1969, any claim is barred by the three year statute of limitations. Pursley was informed, on March 12, 1969, that he would not be rehired; since the complaint was filed on March 21, 1972, the claim is barred by the statute.

Plaintiffs have attempted to avoid this conclusion by arguing that the statute of limitations was tolled from March 13, 1969, until August 12, 1969. On March 13, a Dr. Rauch instituted a grievance hearing on behalf of Pursley. The grievance committee recommended that Pursely be rehired and paid for the work he had performed during the Spring 1969 semester. On August 12, 1969, Dr. Hayakawa refused to follow the panel's recommendation. Plaintiffs argue that the statute was tolled during the grievance procedure and until Dr. Hayakawa's action on August 12. While it is true that a statute of limitations may be tolled during certain administrative proceedings, that principle has no application in this case. The grievance procedure in effect at

SFSC at the time provided that a grievance could be maintained only by members of the faculty or administration, and Pursley was neither. That Dr. Rauch took it upon himself to file a grievance in an attempt to have Pursely rehired, while perhaps commendable, did not result in an administrative remedy being available to or invoked by Pursely himself, and hence the statute was not tolled.

The California cases cited by plaintiffs are clearly distinguishable from the instant situation. In *Elkins v. Derby,* 12 Cal. 3d 410 (1974), *Myers v. County of Orange,* 6 Cal.App. 3d 626 (1970), and other cases cited, the plaintiff himself pursued administrative remedies which were in fact available to him. As indicated above, in the present case, the grievance procedure here was not available to Pursley, and was pursued by someone other than him. Moreover, the recent Supreme Court decision in *Johnson v. REA,* 421 U.S. 454 (1975), indicates tha the statute of limitations for a §1983 action is not readily tolled by administrative remedies. In *Johnson,* the Court held that the timely filing of an administrative charge with the EEOC pursuant to Title VII did not toll the running of the statute of limitations applicable to an action based on 42 U.S.C.§1981. See also, *Guy v. Robbins and Myers, Inc.,* 45 U.S.L.W. 4068 (1976).

THE THIRD CLAIM

The third claim is brought by Daniels, Greene,

Jenkins and Simmons on behalf of all students arrested on January 23, 1969, and against whom disciplinary proceedings were initiated as a result. The complaint alleges that plaintiffs were deprived of a fair hearing, in violation of their Fifth and Fourteenth Amendment rights, by the process by which members of the faculty hearing panels were selected, by the failure adequately to separate prosecutorial and adjudicatory roles, by Hayakawa's bias, and by inadequate notice of the charges lodged.

Once again, plaintiffs are barred by a prior suit. In *Wong v. Hayakawa* (N.D. Cal. No. 50983), a number of students challenged these same disciplinary proceedings. Judge Zirpoli cited *Scoggin v. Lincoln University,* 291 F.Supp. 161, 171 (W.D. Mo. 1968), for the proposition that the minimal due process requirements in student discipline cases were 1) that adequate notice be given of the charges and evidence; 2) that an opportunity for a fair hearing be given the student; and 3) that no disciplinary action be taken on grounds not supported by substantial evidence. Judge Zirpoli expressly found that the first two requirements had been satisfied in the disciplinary proceedings in question, but that the their requirement was not met *as to the particular plaintiffs* in the *Wong* case, because the only evidence relied on in imposing discipline on them was in inadequate police report. Since the present case does not allege that there was a similar inadequacy of evidence but rather

challenges only the same notice and hearing procedures which were upheld in *Wong*, the claim is barred by the prior suit.

THE FOURTH CLAIM

The fourth claim is brought by Jackson, Bell, Reams and Jordan on behalf of all candidates for election to student office in 1970 as members of certain slates. These candidates were declared ineligible to run for office by student Mark Wolfe, the election committee chairman. Plaintiffs disputed this decision but the Student Legislature upheld it. Plaintiffs then asked Hayakawa to delay the election and resolve the issue of eligibility, which, after an administrative hearing, he refused to do. Plaintiffs now allege that Hayakawa was biased in his ruling.

Once again, an earlier action is dispositive. In *Bull-Moose Party v. Hayakawa*, (N.D. Cal. No. C-70835 RFP) certain plaintiffs sought a preliminary injunction to prevent the same student body elections at SFSC in April of 1970. Judge Peckham concluded that the issues were moot or about to become moot, and dismissed the action, such dismissal being without prejudice to the filing of a new action in the event that "further instances occur of confusion in connection with registration of students. . . ." Insofar as the instant complaint alleges no "further instances", the dismissal in the *Bull-Moose* case

precludes further litigation concerning the propriety of Hayakawa's refusal to delay the election. Whatever claims arising from the sequence of events surrounding the election and Hayakawa's actions, whether for damages or for injunctive relief, should have been raised in the *Bull-Moose* case, and the dismissal in that case is conclusive as to all such matters. *Cambist Films Inc. v. Duggan*, 475 F.2d 887, 890-891 (3rd Cir. 1973); *Clark v. Redeker*, 406 F.2d 883 (9th Cir. 1969). Plaintiffs have had their day in court: two of the named plaintiffs for this claim as well. As discussed above with respect to the first claim, the identity between their interests and the interests of the other named plaintiffs be barred by principles of res judicata. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975).

Even disregarding the *Bull-Moose* case, plaintiffs would be unable to state a claim for relief. The apparent reason why the student government did not allow plaintiffs to run for office was their lack of qualification to do so – specifically, they were not full time students or did not have a sufficiently high grade point average. Inasmuch as these objective prerequisites to candidacy were not satisified, it was proper for the student government to refuse plaintiffs access to the ballot, and it is difficult to conceive how Hayakawa, by merely refusing to overrule the student government, acted in violation of their constitutional rights. There existed clear, indepen-

dent, constitutionally lawful reasons for not overruling the student government and barring plaintiffs from running for office. Cf. *Mount Healthy City School District v. Doyle, 45 U.S.L.W. 4079 (1977).*

THE FIFTH CLAIM

The fifth claim is brought by various individual plaintiffs, and alleges that the Black Students Union (BSU), because it was active in the campus activities of 1969-1970, was budgeted inadequate funds to pay the salaries of all those it had hired. Defendants have shown that: i) the demands for money by various groups exceended the available funds; ii) that various minority groups, including the BSU, received funds; and iii) that the BSU received much more than most groups, and infact received a disproportionately large share of available funds. Accordingly, these is no evidence that the BSU, which received proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its "expectations" might have been and what promises might have been made.

For these reasons herein stated, defendants' motion for summary judgment on plaintiffs' third amended complaint is granted.

IT IS SO ORDERED.

DATED: April 20, 1977

WILLIAM W. SCHWARZER
United States District Judge

APPENDIX 3

CERTIFIED CLASS CONSISTING OF THOSE PERSONS DENIED EMPLOYMENT BASED ON THE BLACKLISTS

Petitioners alleged in their Second Claim that, on February 17, 1969, and on February 18, 1969, following the mass arrest in the campus, defendants compiled blacklists of persons arrested for the purpose of denying them employment at San Franciso State College. In particular, the Third Amended Complaint alleges that plaintiff Peter Pursely, whose name appears on the "blacklist" was approved for teaching during the Spring Semester, 1969, in fact taught in the psycology department, but because of the "blacklist" respondents refused to pay him for the work performed as were other persons similarly situated. As to this claim, Judge Peckham certified a class consisting of the following individuals:

> "Those persons whose name appear on the list, originally attached to a memorandum signed by S.I. Hayakawa dated February 17, 1969, or on amemded official lists subsequently issued containing additional names, and who were denied employment because their names appeared on said list and who would have otherwise obtained employment in a college program."

Interdepartmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Reginald Majors, Director, Education Opportunity Program

DATE: Feb. 17, 1969

FROM: S.I. Hayakawa Acting President

SUBJECT: Hiring Eligibility Spring Educational Opportunities Program

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the spring semester any individuals arrested for distrubances in the fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college program for the spring semester.

SIH:lb
Attach:
cc: Vice President Garrity
Dean Daniel Feder

Interdepartmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Donald Garrity, Vice President - Academic Affairs

Date: February 18, 1969

FROM: S.I. Hayakawa, Acting President

SUBJECT: Hiring Eligibility. Spring Semester

After thorough consideration, my administrative staff and I feel that it would be inapproriated for the college to employ for the Spring Semester any individuals arrested for distubances in the Fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college programs including appointment as teaching and graduate assistants for the Spring Semester.

ORIGINAL BLACKLIST MEMOS:

On the previous page we wrote out what the memos accompanying the blacklists read because we wanted the memos to be legible. But here are the original memos under the signature of S.I. Hayakawa.

Departmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Dr. Harold Nelson, Director, Educational Opportunity Program DATE Feb. 17, 1969

FROM: S. Hayakawa, Acting President

SUBJECT: Hiring eligibility Spring Educational Opportunities Program

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the spring semester any individuals arrested for disturbances in the fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college program for the spring semester.

S.I. Hayakawa

SIH:lb
Attach:
cc: Vice President Garrity
Dean Daniel Feder

Departmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Donald Garrity, Vice President-Academic Affairs DATE February 18, 1969

FROM: S. I. Hayakawa, Acting President

SUBJECT: Hiring Eligibility, Spring Semester

S. I. Hayakawa

RECEIVED
FEB 18 1969

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the Spring Semester any individuals arrested for disturbances in the Fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college programs including appointment as teaching and graduate assistants for the Spring Semester .

CONSOLIDATED LIST OF PERSONS ARRESTED

Adamski, Carol J.
Alcantara, Ray
Alvarado, Frank S.
Alvarado, Julio E.
Alvarado, Roger T.
Alt, Terry B.
Anidon, Peggy
Anton, Anatole
Apana, Karen
Applman, Daniel
Arbogast, Brian
Arbogast, Christine
Art, John
Arthur, Lynn
Ayala, Renaldo
Agla, Oladitto
Aitken, Bruce J.
Alexis, Jack H.
Allen, Avery T.

Bain, Michelle
Baker, Barbara A.
Barickman, Namby M.
Barman, Michele J.
Barnett, Ruth P.
Barnette, Boyd
Barr, Matthew
Barrett, Teresa
Beach, Jeffrey
Bell, Thomas
Bentzman, Bette
Beaudoin, Mark W.
Bergman, Miranda
Berkelman, Pearl
Bethell, Susan M.
Beytin, Susan A.
Biberman, George A.
Bishop, Betty
Blaine, Michael P.
Bliss, James
Bodine, Carol K.
Boland, Mary E.
Boles, Juanita K.
Boles, Leslie
Bonifas, Barbara
Boone, Barrie D.
Borovoy, Barbara
Bovey, Frank A.
Bowen, Gordon L.
Bozorg, Abbass
Bradford, Pat M.
Braeger, Gene R.
Branconi, Jean
Brill, Ernest
Broadhead, Robert H.
Brongel, Richard H.
Brown, Elizabeth
Brown, Robert F.
Brown, Sheila M.
Brozicevic, Connie J.
Bruce, Herbert G.
Brush, James A.
Burtless, Alice V.
Bush, Michael R.
Butz, Carl J.
Barr, Gary Francis
Barron, Gregory Mark
Baskerville, John W.
Beresford, Donald J.
Berry, Frederick George
Aka: Brown
Black, Sylvester A.
Block, Larry
Bousquet, Joseph E.
Brandon, Daniel K.
Brod, John G.
Brooks, David R.
Brunner, George Andrew
Buell, Thomas Phillip
Butler, Patricia L.

Campbell, Janet M.
Campbell, Philip W.
Campusano, Jesus A.
Canright, Michael J.
Canright, Stephen J.

Carey, Michael
Carpenter, Willard
Carrillo, Carmen
Casqueiro, Larry C.
Cavaliero, Victor
Cavanaugh, Benjamine M.
Chambers, John L.
Chew, Laureen
Chew, Herb
Chin, Eddie Y.
Chlosta, Deborah
Chop, Jeffrey
Churchill, Ellen
Ciucci, Elizabeth
Cirimeli, Jean
Coats, Timothy J.
Cleveland, John D.
Codiga, Lynn
Colbert, George P.
Colcord, Kathy
Cole, Roy P.
Colosimo, Louis A.
Colwell, Brent A.
Connolly, Stephen B.
Contreras, Jesse
Cook, Helen
Cooper, Michael
Cordova, Salvador R.
Crank, Charles S.
Creer, Delores
Cresci, Melanie
Crouch, George R.
Cooke, Christopher C.
Crutchfield, Nesbit D.
Curtis, Richard
Campbell, Bruce L.
Canada, Kenneth
Carson, Frederick
Cassell, Roger C.
Cato, Welton J.
Clark, Steven K.
Coaks, Theris
Cuddy, Ronald W.

Dillon, Hari
Dahl, Linda
Daniels, Lonnie J.
Deanbrogio, David
De Giere, Gregory
Delanoy, Robert
De la Cruz, Edward
De Lago, Patricia
De la Rosa, Jean
Demarco, Gordon
Denton, David
Desegur, Gerrard
Dobriski, Michael G.
Douglas, James R.
Dreith, Dave
Dubose, Jonathan M.
Dewitt, Elizabeth
Dillon, Elena
DiMero, Jane L.
Dobkowitz, Roger
Donneerberg, Elizabeth
Drake, Pamela
Drath, Marilyn
Druehl, Greg
Dug[illegible]h, James
Davis, John
Devore, John

Ewart, George
Easton, Sharon
Embry, Martha
Ennis, Kathleen
Eng, Jane
English, Robert S.
Epps, Kathrin A.
Erickson, Judy
Erickson, Paul R.
Edwards, Thomas B.

Frank, Carl
Feely, Diane
Feffis, Karen Aka
Ferris, Karen
Ferentinos, George
Forman, Harold A.
Forman, Alexander

Forsyth, Neil
Freeman, Edward
French, Kelly
Friedlander, David
Frisch, Patricia
Fujimoto, Chris
Furuyama, Matsuo
Faltus, Susan
Feinglass, Robert A.
Fiddes, James W.
Fisher, John C.
Flanagan, Michael D.
Fiorini, Elizabeth
Foreman, Harold A.

Gail, Isidu
Glenn, Gail
Gorner, George
Gelin, Richard
Gibson, Richard
Goldstein. David
Goodlett, Carleton
Gordon, David
Gray, Katherine
Gwyn, Thomas W.
Gabel, Thomas
Garbell, Harlan
Garth, Beatrice
Gary, Paul aka
Paul Voss
Garren, Lynn
Gates, Richard
Gernand, Bruce
Gesas, Gloria
Gilbert, Suzanne
Gillig, Nina
Ginestra, James
Gitlin, Todd
Glaspie, Mary L.
Glover, Danny L.
Gold, Steven K.
Golde, Patricia
Goodfield, Barry
Goodman, Brenda J.
Goodman, Theodore J.

Goodwin, Leroy Jr.
Goodwin, Thomas H.
Gorringe, Richard A.
Grace, Robert L.
Gracia, Ronald L.
Gravitt, Mary R.
Green, Larry
Greene, Anthony
Greer, Elizabeth
Green, Dove
Griffin, Donald Q.
Griffith, Richard D.
Gromin, Richard J.
Grosten, Gordon
Guiterrez, Lisa R.
Gustafson, James P.
Grissom, Pamela

Hano, Susan C.
Hansen, John M.
Hanson, Charles A.
Hanson, Peter P.
Harbeck, Ronald
Hare, Nathan
Harrington, Peter R.
Harris, Steven L.
Hauser, Sandra K.
Hayes, Thomas M.
Helmer, William
Helppie, Douglas W.
Hertzman, sandra J.
Hetherington, Penny A.
Hewitt, Sharon K.
Heynick, Carla M.
Hilberman, Kathe R.
Hill, Patricia A.
Hinman, Pricilla
Howard, Gwendolyn A.
Huber, Michael D.
Huddleston, Betty J.
Hughes, Dale L.
Huntington, Dennis O.
Hyink, Lawrence
Hamilton, Charles R.
Hammerling, Phillip S.

Hands, Peter A.
Harrison, Roy A. Jr.
Hartman, Joseph Gelders
Heers, Arthur F.
Heft, Robert C.
Hill, Gary L.
Howe, Steven D.
Hyland, Richard F.
Hamilton, Raymond W.
Hartford, Bruce A.
Henricks, John W.
Hughes, Dale
Hunter, Delores
Hartog, Phillip A.
Ikeda, Carolyn T.
Ilumin, Edward G.
Ilumin, Robert G.

Jewett, David G.
Johnson, Cynthia
Johnson, Gail F.
Johnson, Renee
Jones, Elwood F.
Jones, Jeffrey C.
Jones, Ronald R.
Jones, Ronnie H.
Joslin, Teri A.
Juchert, Walter R.
Jones, Sharon
Jones, William
Jarrell, Donald
Jenkins, Johnnie
Johnston, Frank E.
Jordan, Don D.

Kaffke, Roberto
Kalantari, Khosro
Kane, Jennifer
Kangas, Andrew
Kangas, Emil
Katzman, Seth
Kearney, Frederick
Kearney, Karen A.
Kearns, Brantley F.
Kee, Frank D.

Kelley, Bonnie P.
Kelly, Georgia P.
Kelly, Kathryn E.
Killebrew, Emily L.
Kissack, Anne C.
Kitt, Douglas
Koenig, Nancy L.
Koloms, Charles A.
Kopke, Alan N.
Kopke, Syrilda S.
Kornfeld, Alan D.
Kramer, Helen
Krueger, John D.
Kuraoka, David
Kurz, Connie
Kelly, William J.
Kolodzik, Dennis
Kornfeld, Phillip J.

Lamont, Dortia
LaMotte, Sharon K.
Landis, Dale A.
Lanright, David M.
Larney, Garry L.
Larez, Manuel D.
Larsen, Gerlad E.
Larsen, Larry L.
Laughland, Donald A.
Ledbetter, Sandra
Lee, Berwyn
Lee, Nathan
Lee, Weyman
Leong, George
Levin, Carol A.
Levine, Geni
Levy, Robert
Lewis, Melinda
Llamas, Roger
Llorente, Edward
Lockshin, Larry
Lopez, Jose
Love, Jonathan
Lum, Kendric
Larsen, Bill A.
Leeds, Joshua

Lesser, Craig
Levin, John G.
Lewis, Nancy
Lindsley, Byron F. Jr.
Lum, Halford J.

Macklin, Richard
Mackenzie, Anne
Magezis, Joy
Mannix, Molly
Mannick, John
Manwell, Robert
Marca, Ortiz
March, Rachel
Marchi, Eugene
Margolis, Gregory
Massion, Mark E.
Maxey, Thomas
McCarthy, Martha A.
McFarran, Jonn C.
McGee, Martha J.
McMath, Moina G.
McMurray, Margie
Meyers, Helen
Millbury, Peter
Mills, Thomas
Molloy, Susan R.
Montes, Regino S.
Morris, Peter
Morrissey, William G.
Moore, Diane
Moore, Rex
Morrow, Cheryl
Morton, Patricia
Mudavahna, Leonard
Muniz, Jaime
Martin, Douglas
Martinez, Gene
Miller, David
Miranda, Anthony
Matthews, Glenn T.
Matusek, Brett V.
Milne, Emile A.
Mowdy, Robert W.
Murray, George M.

McAllister, Donald
Maass, Steven O.
Malone, Alex McRae Jr.
Mayer, William

Napoliton, Sally
Nelson, Eric
Noel, Kenneth
Nesmith, Claire A.
Noordhoff, Paulette

O'Callaghan, Michael
O'Nela, Daniel A.
O'Neal, Dennis
O'Quin, Michael
Orr, Harry
Ortiz, Rachel
Ott, John
Okpokam, Paul N.
Oliver, James J.
Ortega, Robert R.

Pallidono, Moiece L.
Palm, Anita
Patacsil, Alice
Paul, Dharm
Pedraza, Mary
Peebles, John S.
Perez, Gary F.
Perry, David
Pfeifer, Karen
Pifarre, Juan
Pine, Charles
Pine, Ruth
Poge, Ruth
Pratt, James
Pulliam, William
Pursely, Peter
Passalalpi, Carlo L.
Pehrson, Gregory
Pederson, Gerald
Powell, Grant
Price, George
Prudhomme, Robert

Queen, James
Quijano, Gena M.
Quinn, Charles D.
Quinn, Jacquelin
Quidachay, Ronald

Radford, Tommie
Randall, Bridges
Rappaport, Betty
Rasmussen, Charles
Rex, Sue A.
Riley, Harold
Roberts, Stanley
Robertson, Phillip
Rogers, William H.
Romero, Rosemary aka
Zepeda, Rosemary
Romero, James
Rosemark, William
Ross, Karen
Rotoner, Rita
Rutzick, Phillip
Rothbaum, Charels
Ruiz, Ralph
Rappaport, Bruce M.
Reggiardo, Carl J.
Reim, Terry A.
Ricci, Humberto
Rice, Alfred
Rivera, Juan A.
Robinson, Willie Ed.

Safiont, Jose
Sagun, Rueben F.
Sakala, Patricia M.
Sakamoto, Sheila
Salner, David
Saunders, Virginia
Schneider, Curt
Schneider, Susan M.
Schumacher, John E.
Schuman, Linda V.
Segen, William F.
Shapiro, Mark S.
Shimuzu, Megumi

Shinn, Eric
Shively, Mary
Short, Alan
Simmons, Sollie J.
Slouber, John
Smith, Maryann
Sogol, Leslie
Solganick, Jan
Schumacher, Thomas
Smith, Bruce
Smith, Heidi
Smith, Janice
Smith, Marilyn
Smith, Vern
Smyth, Andrew
Spasaro, Frank P.
Sperber, David P.
Siplman, Richard S.
Stack, Mark
Stein, Allison
Stensrud, Peter
Stephens, Michael
Sternberg, Lawrence
Stevens, Fred
Stwart, Benjamin
Stice, Kenneth
Stigall, Lorna
Stocker, Thomas
Stoloff, Pamela
Stratton, Cathie
Stringer, Bernard
Sturdevant, Norman
Sundermeyer, Michael
Sherlock, Joe
Sloan, Nancy
Smothers, Donald
Stonum, Jerry
Stuart, Philip
Salter, James W.
Sampson, Daniel Jr.
Savage, Arthur D.
Scheimer, Gordon
Silverman, Janet
Smith, Harry
Smith, Kenneth J.

Stephen, Norman J.
Stroud, Welvin L.

Tabachnick, Carol
Takahashi, Elizabeth
Taylor, Anne
Taylor, Carol
Taylor, Gerald
Taylor, John R.
Teeter, Donald
Terauchi, Terrance
Thalheimer, Fred
Thalheimer, Patricia
Thom, Glen
Thomas, Carolyn
Torshizi, Alierza
Torre, Helen
Townsend, Arnold
Tracy, Rose
Tucker, Catherine
Turner, Walter
Tyson, William
Theriot, Marilyn
Taylor, Robert D.
Tokarsky, Robet I.
Thrombley, John R.
Treskunif, Sharon

Uran, Marilyn

Vardara, Phillip
Vargas, Robert
Vialpando, Sadie
Viniegra, Louis
Vorsatz, Louise
Varnardo, Jerry C.
Varnado, Jerry W.
Vose, Gregory

Walton, Jimmy
Waters, Simon
Watters, Laurie
Webb, John
Weir, Wendy
Weisend, Mary
Wells, Janet
Welsh, David
West, Donna
West, John
Wexler, Jeffrey
Wheelock, Jose
White, Janet
Willems, James
Williams, Thomas
Wilmot, Patrick
Wilson, Claude
Wilson, James
Wilson, Patricia
Wilson, William
Winans, Lorrie
Winter, George
Winters, Lynne
Wong, Alfred
Wing, Gery
Wong, Harold Stanley
Wong, Mason
Wooman, Patricia
Woseeri, Kathy
Washington, Cecil
Wong, Stanley
Washington, Robert L.
Weichel, Kenneth
Wheeler, David
Whitehorn, Robert
Williams, Meril
Wittmaack, Ronald aka
Whittmaack, Ronald
Wickum, Jeff
Williams, Arthur
Ward, Jennifer L.

Yamazaki, Paul
Yeghoian, Paula
Young, John
Yoza, Clifton
Yamahon, Daniel M.

Zebrowski, Wllwn
Zeitman, Sandra
Zeppa, Alan

Zolli, Robert
Zorthian, Barry
Zeltzer, Steve

Peter Pursley was the representative of the class as defined by Judge Peckham. The above lists of names accompanied the February 17, blacklists and amended lists in accordance with the class boundries. Petitioners discovery did find many other members of the academic community has been denied employment because of the enforcement of the blacklists but discovery terminated upon the granting of summary judgment. Acknowledge of the authenticity of these blacklists can be found in the answer to respondent Hayakawa's interrogatories; respondent Hayakawa's deposition of November 15, 1974. In addition, the deposition of Samuel I. Hayakawa in *Barry Jablon v. S.I. Hayakawa* et al No. C-71 2021 SAW Aug. 22, 1972.

APPENDIX 4

DECLARATON OF BLACKLISTS CLASS REPRESENTATIVE PETER W. PURSLEY

I, Peter W. Pursley, declare as follows:

1. From September, 1968 through June, 1970, I taught in the Psychology Department at San Francisco State College on a part-time basis. My appointments to teach were made at the beginning of each semester.

2. The hiring procedure customarily involved oral notice of appointment from the appropriate department administrator and subsequent routine processing of appointment papers.

3. After the commencement of the Spring, 1969 semester on February 17, 1969, I began teaching an undergraduate course in psychology upon instruction to

do so from psychology faculty member Mr. George Craddock. Mr Craddock was the coordinator of the program in which I taught and he advised me that his reccomendation that I be rehired to teach in Spring, 1969 had been approved by the Psycology Department Chairman, Dr. Stephen Rauch.

4. Because of administrative delays, the Spring, 1969 appointment papers for myself and other instructors were not initiated until February 20, 1969. Subsequently, my appointment papers were approved by the Dean of the School of Behavioral and Social Sciences.

5. On March 12, 1969, Dr. Rauch was informed by Frank Dollard of the College Administration that the administration would not approve my rehiring because my name had appeared on a list of persons arrested at the College.

6. Dr, Rauch promptly notified me of this development but instructed me to continue meeting my class. Because the administration's refusal to approve my rehiring was for reasons unrelated to my qualifications to teach, Dr. Rauch was confident that approval for my rehiring could be obtained through the College's grievance procedure.

7. On March 13, 1969, Dr. Rauch filed a grievance with the College's Grievance and Disciplinary Action Panel. The Panel sustained Dr. Rauch's contention that the administration's refusal to approve my rehiring was improper and specifically recommended that I be reim-

bursed for teaching services rendered.

8. I taught for the entire Spring, 1969 semester with the approval of the Psychology Department Chairman and the program coordinator. I received no pay from the school.

9. On August 12, 1969, College President S.I. Hayakawa gave written notice to the Chairman of the Grievance and Disciplinary Panel that he would not implement the Panel's recommendations.

10. In September, 1969, Dr. Rauch submitted for Fall semester, 1969, my appointment papers. After initial indications that the administration would again oppose my appointment because of the arrest list, the administration reversed its position and approved my rehiring for the Fall semester, 1969.

11. In a memorandum dated June 5, 1969, Dr. Dollard acknowledged the fact of my "continuing employment" at the College in and instructional capacity. A copy of that memorandum is attached hereto as Exhibit "A".

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of March, 1977, at San Francisco, California.

PETER W. PURSLEY

INTERDEPARTMENTAL CORRESPONDENCE

SAN FRANCISCO STATE COLLEGE

TO: President Hayakawa
FROM: Dr. Frank Dollard
SUBJECT: Presidential directive of February 18, 1969

DATE: May 7, 1969

Pursuant to my report yesterday, I wish to question the continuing "employment" of Mr. Pursley, Mr. Varnado, and Mr. Crutchfield as part-time instructors in E.O.P. It seems to me improper that these students should be employed, even without pay, since their employment in an instructional capacity, under the conditions, flouts the President's directive of February 18th. It might also establish an intolerable precedent for ignoring other Presidential orders. I think it necessary to take appropriate action in regard to those responsible for this situation.

The grievance that Dr. Rauch has brought against me will go to a full hearing. The grievance is actually directed primarily against the President's directive with respect to Mr. Pursley. If the hearing Committee decides in favor of Dr. Rauch, we will face some disagreeable repercussions. I think it essential that we confer before the hearing begins so as to make certain that we are clear in our understanding of the reasons for the directive.

fdd:vk
cc -Vice President Garrity
Vice President Smith
Dean Reddell
Dr. Duerr
Mr. Jones

PROOF OF SERVICE

I, JOHN H. TUCKER JR., member, U.S. Supreme Court do hereby declare that pursuant to the order for service of process other than by U.S. Marshall respondents through their counsel were served copies of this writ as follows:

3 copies

Attorney General of the State of California
Deputy Attorney General MATTHEW P. BOYLE
6000 State Building
San Francisco, CA 94102

San Francisco State University
Dr. Paul Romberg, President
1600 Holloway Avenue
San Francisco, CA 94132

S.I. Hayakawa
225 Eldridge Avenue
Mill Valley, CA 94941

In addition, any and all notices, applications, motions, etc. by the U.S. Supreme Court Clerks or respondents should be mailed to the following address:

RONALD J. JACKSON, Esq.
Engram, Owens & Jackson
2 West 45th Street
New York, New York 10036
Tele: (212) 921-2771